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IN THE
Supreme Court of the United States

KINGDOM OF SAUDI ARABIA AND
MINISTRY OF DEFENSE AND AVIATION OF
THE KINGDOM OF SAUDI ARABIA,

Cross-Petitioners,

V.

UNC LEAR SERVICES, INC. AND
LEAR SIEGLER SERVICES, INC.,

Cross-Respondents

ON CONDITIONAL CROSS-PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

CONDITIONAL CROSS-PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether, in a *forum non conveniens* analysis, the plaintiff's choice of a United States forum is entitled to any favorable presumption where the plaintiff is a giant multinational conglomerate that actively solicited the foreign government contracts at the center of the dispute and agreed to forum selection clauses specifying resolution of any disputes in the foreign sovereign's own courts.

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OPINIONS BELOW

The opinion of the court of appeals is reported at 581 F.3d 210. Pet. App. 1-26.[1] The opinion of the district court denying the Kingdom's[2] motion to dismiss based on foreign sovereign immunity and *forum non conveniens* is available at 2008 WL 2946059 Pet. App. 27-86. The orders of the district court denying the Kingdom's motions to dismiss based on contractual forum selection clauses and the act of state doctrine are unreported. KRE3-030 to 032; KRE4-033 to 035.

JURISDICTION

The judgment of the court of appeals was entered on August 18, 2009. Petitions for rehearing were denied in a *per curiam* order on September 11, 2009. Pet. App. 87. The petition for a writ of certiorari was filed by Plaintiffs (together, "Lear") on December 10, 2009. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1) and Rule 12.5 of the Rules of the Supreme Court.

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[1] References to "Pet App " are to the Appendix to Plaintiffs' Petition for a Writ of Certiorari, No 09-687 We use the same shorthand as the Petition to cite to materials that are not included in the Appendix to the Petition *See* Pet nn 2-6 (No 09-687)

[2] Cross-Petitioners are the Kingdom of Saudi Arabia and its Ministry of Defense and Aviation (together, the "Kingdom")

STATEMENT

Lear, a multinational conglomerate, sued the Kingdom, a foreign sovereign, in United States district court asserting claims based on two Saudi military defense contracts, referred to as the SPAGE and TSP contracts. The court of appeals held that, under the Foreign Sovereign Immunities Act of 1976, 28 U.S.C. §§ 1330, 1602-11 ("FSIA"), the Kingdom is immune from Lear's claims related to the TSP contract, but not from Lear's claims related to the SPAGE contract. Pet. App. 1-26. Lear has petitioned this Court for review of the court of appeals' holding that Lear's TSP claims do not fall within the FSIA's commercial activity exception to sovereign immunity.

The Kingdom has opposed review because the decision below properly applies settled law to determine the character of the TSP contract by reference to its nature rather than its purpose; correctly recites the facts of the case based on the plain language of the contracts, and, contrary to Lear's doomsday warnings, has no broad ramifications for United States national security or otherwise. For the reasons stated in the Kingdom's Brief in Opposition in No. 09-687, this Court should deny review.

Nevertheless, if this Court grants certiorari to review the court of appeals' decision on Lear's petition, we request that the Court first consider whether, in its *forum non conveniens* analysis, the court of appeals erred in deferring to the plaintiff's choice of a United States forum where the plaintiff agreed by contract to a foreign forum and where the plaintiff is a large

multinational company that solicited and undertook substantial business in the foreign jurisdiction. *See Sinochem Int'l Co. v. Malaysia Int'l Shipping Corp.*, 549 U.S. 422, 436 (2007) (holding that courts may properly dismiss for *forum non conveniens* to avoid reaching difficult jurisdictional questions). Other courts of appeals considering these issues have given, at most, diminished deference to a plaintiff's forum choice in these circumstances. Contrary to the approach taken in those cases, the decision below utilizes a highly deferential standard favoring Lear's choice of a United States forum.

The Kingdom relies on the Statement in its Brief in Opposition for the factual and procedural background of this case, adding here only a brief discussion of the history that bears specifically on the *forum non conveniens* analysis.

1. Lear is a multinational conglomerate that conducts military defense contracting operations in numerous countries around the globe. DX 12. Defendants in this action are the Kingdom of Saudi Arabia and its Ministry of Defense and Aviation. Pet. App. 1. Even before the events giving rise to this dispute, Lear undertook an extensive defense contracting business in Saudi Arabia over a period of decades. DX 22. In connection with this overseas work, Lear litigated (and won) other disputes in Saudi courts, DX 32, and developed relationships with Saudi lawyers, accountants, and other professionals. DX 29.

After completing formal bidding processes, DX 5-8, 12-14, the Kingdom and Lear entered the SPAGE and

TSP military defense contracts in Saudi Arabia in 1995 and 1996, respectively. KRE7-105; KRE6-086. The contents of the SPAGE contract are "classified" as "Official Secrets" of the Royal Saudi Air Force ("RSAF"), KRE7-113, and both contracts prohibit unauthorized disclosure of the Kingdom's "restricted security information" made known to Lear through its work on the contracts. DX 1, Annex A § 9; DX 2, General Provisions § 17; *see* DX 20 (procedures for TSP workers' "safeguarding" of "RSAF classified information").

Both contracts contain forum selection clauses unambiguously specifying a court in Saudi Arabia, the Board of Grievances, as the proper forum to resolve any disputes:

> Any disputes that may arise from the application or interpretation of any of the provisions of this Contract . . . , the Contractor . . . shall have the right to appeal to the Board of Grievances within thirty (30) days from the receipt of the Government's decision, *otherwise it shall be considered as accepting said decision.*

Pet. App. 19 (quoting SPAGE forum selection clause) (emphasis added); *accord* KRE6-090 (same in TSP contract).

In addition, both contracts contain choice of law provisions designating Saudi law. KRE7-111 to 112; KRE6-091. The contracts also contain numerous other references to Saudi law on procurement, labor, employment, taxation, importation and customs,

immigration, social insurance, accounting, and health and immunization. DX 1, General Provisions §§ 1, 3-4, 6-7, 11, 14, 18; DX 2, General Provisions §§ 1, 3, 5, 10-11, 14, 18, 21, 24-26, 28-30, 33, 35. And the contracts give controlling weight to their Arabic language versions (over the English translations). KRE6-095; KRE7-114. Thus, adjudicating a dispute in the manner directed by the contracts requires understanding of Saudi law and fluency in Arabic.

2. In seeking *forum non conveniens* dismissal, the Kingdom argued that, in this case, the doctrine should be evaluated on a level playing field with no deference to Lear's forum choice because of the contractual forum selection clauses specifying a Saudi court and because Lear is a multinational conglomerate that actively sought the disputed overseas contracts, conducted extensive business in Saudi Arabia, and successfully litigated other disputes in Saudi courts. Under a standard of no deference to Lear, the Kingdom argued that the balance of the private and public interest factors set out in *Gulf Oil Corp. v Gilbert*, 330 U.S. 501 (1947), requires dismissal because, among other reasons, Saudi law governs this dispute; the Arabic language versions of the disputed Saudi military defense contracts control; and the Kingdom (like other sovereigns) has a strong public interest in using its own courts to resolve claims arising from its classified military defense contracts.

The district court denied the Kingdom's motion to dismiss for *forum non conveniens*. Pet. App. 86. Rejecting the Kingdom's proposed standard of no deference, the court applied "a strong presumption in favor of the plaintiff's choice of forum that may be overcome only when the private and public interest factors clearly point towards trial in the alternative forum." *Id* at 75 (citation and internal quotation marks omitted). Relying on *Gilbert*, 330 U.S. at 508, the court stated that "[u]nless the balance is strongly in favor of the defendant, the plaintiff's choice of forum should rarely be disturbed." Pet. App. 75; *accord id.* at 76-77. "With this standard in mind, and according deference [to Lear's] forum choice," *id.* at 77, the district court held that the Kingdom did not make a sufficiently "strong showing that the alternate forum, when weighed against [Lear's] forum choice, is significantly more convenient . . . ." *Id.* at 86.

3. The court of appeals affirmed the denial of dismissal on *forum non conveniens* grounds, discussing only "the controversy regarding the SPAGE contract . . . ." *Id.* at 24. The court of appeals likewise rejected the Kingdom's proposed standard of no deference, again stating that "[u]nless the balance is strongly in favor of the defendant, the plaintiff's choice of forum should rarely be disturbed." *Id.* at 23 (quoting *Gilbert*, 330 U.S. at 508); *see id* at 25 ("The district court applied the proper law in evaluating the Kingdom's motion to dismiss for forum non conveniens.").

REASONS FOR GRANTING THE PETITION

The Kingdom has opposed Lear's petition for a writ of certiorari. If this Court grants review, however, the Kingdom requests that the Court also resolve divisions of circuit authority regarding a fundamental issue common in litigation of international disputes: the correct standard to evaluate a *forum non conveniens* defense. This is an issue of exceptional and recurring importance for American law and for foreign sovereigns that contract with U.S.-based multinational companies. And if the Court accepts review on Lear's petition, considering the Kingdom's issues on cross-petition will occupy few additional resources of the Court because both cases involve the same parties and contracts.

I. The Decision Below Conflicts With Circuits that Deny Any Deference to Plaintiff's Forum Choice Where the Parties' Contract Specifies a Foreign Forum

The court of appeals applied a highly deferential standard favoring Lear's choice of a United States forum. The deferential standard used to deny dismissal, however, is contrary to court of appeals decisions holding that a plaintiff's forum choice merits *no* deference where the parties' contract specifies a foreign court as the forum to resolve disputes. This sound principle carries special weight where, as here, it is a classified foreign military defense contract that specifies adjudication in the foreign sovereign's own courts. This Court's review is warranted to resolve conflicting authority as to whether a foreign forum selection clause in an international contract offsets any deference to the plaintiff's choice of a United States forum.

Although "there is ordinarily a strong presumption in favor of the plaintiff's choice of forum" in a *forum non conveniens* analysis, plaintiffs do not uniformly enjoy a strong favorable presumption. *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 255-56 (1981). Rather, "the degree of deference to be given to a plaintiff's choice of forum moves on a sliding scale depending on several relevant considerations." *Iragorri v United Techs. Corp.*, 274 F.3d 65, 71 (2d Cir. 2001); *accord Norex Petroleum Ltd. v Access Indus., Inc.*, 416 F.3d 146, 154 (2d Cir. 2005) (degree of deference to forum choice "depend[s] on the degree of convenience reflected by the choice"). This Court has held, for instance, that a foreign plaintiff is not entitled to a strong presumption favoring its choice of a United States forum because, when the plaintiff is foreign, it is "less reasonable" "to assume that this choice is convenient. . . . Because the central purpose of any *forum non conveniens* inquiry is to ensure that the trial is convenient, a foreign plaintiff's choice deserves less deference." *Piper Aircraft*, 454 U.S. at 255-56; *see Pain v. United Techs. Corp.*, 637 F.2d 775, 797-99 (D.C. Cir. 1980) (recognizing that a strong favorable presumption is unwarranted where a plaintiff became a U.S. resident shortly before filing suit or an American plaintiff was added to avoid *forum non conveniens* dismissal).

In accordance with these principles, at least two courts of appeals have denied *any* deference to the plaintiff's choice of a United States forum where a forum selection clause in the parties' contract specifies a foreign forum. *Wong v Partygaming Ltd* , __ F.3d __, 2009 WL 4893955, at *9 (6th Cir. Dec. 21, 2009) (holding that where a forum selection clause in the parties'

contract specified a foreign forum, "the district court did not abuse its discretion by not giving deference to plaintiffs' choice of home forum"); *Evolution Online Sys., Inc. v. Koninklijke PTT Nederland N V, KPN*, 145 F.3d 505, 511 (2d Cir. 1998); *accord Israel Disc. Bank Ltd. v. Schapp*, 505 F. Supp. 2d 651, 661 (C.D. Cal. 2007), *aff'd*, 321 Fed. Appx. 700 (9th Cir. 2009) ("[A] forum-selection clause designating a forum different from that chosen by plaintiff eliminates the presumption in favor of plaintiff's choice of forum." (citation omitted)).[3]

In *Evolution Online Systems*, for instance, the Second Circuit held that the parties' exchange of *draft* contracts containing a foreign forum selection clause eliminated any presumption favoring the plaintiff's forum choice, even if the parties' final contract did not contain an enforceable forum selection clause. 145 F.3d at 511. Thus, the court held that "the district court would

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[3] In the related context of venue transfer under 28 U.S.C. § 1404, courts of appeals likewise have denied any deference to a plaintiff's forum choice where a contractual forum selection clause specifies a different forum. *Jumara v State Farm Ins Co*, 55 F.3d 873, 880 (3d Cir. 1995) ("[W]hile courts normally defer to a plaintiff's choice of forum, such deference is inappropriate where the plaintiff has already freely contractually chosen an appropriate venue."); *In re Ricoh Corp*, 870 F2d 570, 572-73 (11th Cir. 1989) (holding that the district court "clearly abused its discretion" by applying the *Gilbert* presumption in favor of plaintiff's forum choice where a forum selection clause specified a different forum). Indeed, this Court has recognized that a forum selection clause "figures centrally" in a venue transfer analysis. *Stewart Org, Inc v Ricoh Corp*, 487 U.S. 22, 29 (1988) The same reasoning applies in a *forum non conveniens* analysis *See Wong*, 2009 WL 4893955, at *9 (relying on *Jumara* and *In re Ricoh*).

begin its forum non conveniens assessment of *Gulf Oil* factors with a level set of balances, rather than one weighted heavily in favor of the plaintiff's choice of forum." *Id.*; *cf. Neo Sack, Ltd. v. Vinmar Impex, Inc.*, 810 F. Supp. 829, 833 (S.D. Tex. 1993) (holding that even a permissive forum selection clause "provides a clear indication of the parties' expectations" and, in a *forum non conveniens* analysis, "creates a strong presumption favoring venue in the agreed upon forum").

Similarly, several courts of appeals have relied on a foreign forum selection clause to tip the balance of *Gilbert* interest factors in favor of *forum non conveniens* dismissal, albeit apart from the question of deference to the plaintiff's forum choice. *Carey v. Bayerische Hypo-Und Vereinsbank AG*, 370 F.3d 234, 238 (2d Cir. 2004) (affirming a *forum non conveniens* dismissal in part because "the contracting papers provided that the German courts would have jurisdiction in the event of any dispute"); *Mercier v. Sheraton Int'l, Inc.*, 981 F.2d 1345, 1358 (1st Cir. 1992) ("A mutual [foreign] forum selection clause is a factor to be considered in the forum non conveniens analysis."); *Royal Bed & Spring Co. v Famossul Industria e Comercio de Moveis Ltda.*, 906 F.2d 45, 48-53 (1st Cir. 1990) (affirming a *forum non conveniens* dismissal, relying heavily on a foreign forum selection clause in the parties' contract).[4]

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[4] Courts of appeals also have held that a forum selection clause specifying adjudication *in the plaintiff's chosen forum* is an important factor weighing against *forum non conveniens* dismissal. *See, e.g., AAR Int'l, Inc. v. Nimelias Enters. S.A.*, 250 F.3d 510, 525-27 (7th Cir. 2001) (denying a *forum non conveniens* dismissal where the parties had agreed to a permissive forum selection clause allowing suit in the forum).

Contrary to the above decisions, the court of appeals' *forum non conveniens* analysis in this case fails even to acknowledge the SPAGE and TSP forum selection clauses that specify a Saudi court, the Board of Grievances, as the proper forum to resolve any disputes. Those clauses, however, provide a clear indication of the parties' expectation that any disputes over the Kingdom's classified military defense contracts would be resolved in the specified Saudi court. Because Lear agreed by contract to resolve disputes with the Kingdom in a Saudi court, Lear's choice of a United States forum is not entitled to any deference.

Deferring to Lear's choice of a United States forum is particularly inappropriate because, in this case, it is a *classified foreign military defense contract* that specifies adjudication in the foreign sovereign's own courts. In this context, the Kingdom (like other foreign sovereigns) has a unique prerogative to resolve the dispute in its own courts. As this Court recently acknowledged in another context, there is a strong "comity interest in allowing a foreign state to use its own courts for a dispute if it has a right to do so. The dignity of a foreign state is not enhanced if other nations bypass its courts without right or good cause." *Republic of the Philippines v. Pimentel*, 128 S. Ct. 2180, 2190 (2008).

In short, the Kingdom's *forum non conveniens* defense should be evaluated, consistent with the weight of circuit authority, under a standard of no deference to Lear's forum choice and with no presumption at the outset disfavoring dismissal to the contractually agreed-upon foreign forum.

II. The Decision Below Conflicts with Circuits that Discount Deference to the Forum Choice of a Multinational Firm Soliciting and Conducting Overseas Business

The decision below also warrants review because it creates a division of circuit authority on the issue whether a large multinational conglomerate that actively solicited the foreign business giving rise to the dispute should be given only diminished, if any, deference in a *forum non conveniens* analysis. Resolution of this issue is critical to prevent forum shopping by litigants in the global economy.

Following this Court's decision in *Piper Aircraft*, 454 U.S. at 255-56, numerous courts – including the Second, Eighth, and Ninth Circuits – have held that a strong presumption does *not* favor the forum choice of a sophisticated multinational firm, such as Lear, that actively solicited the foreign business giving rise to the dispute. *Carey*, 370 F.3d at 238 (stating that less deference is given where "plaintiffs, which had sought business or made investments abroad, were substantial business entities, easily capable of litigating the disputes that arose out of those ventures in the country where they occurred"); *EFCO Corp. v. Aluma Sys. USA, Inc* , 268 F.3d 601, 603 (8th Cir 2001) (holding that "a court can discount the deference owed to a plaintiff's choice of forum when the plaintiff does extensive business abroad"); *Reid-Walen v. Hansen*, 933 F.2d 1390, 1395 (8th Cir. 1991) (stating that less deference is given when "an American corporation doing extensive foreign business brings an action for injury occurring in a foreign country"); *Contact Lumber Co. v P.T. Moges Shipping Co.*, 918 F.2d 1449-50 (9th Cir. 1990) (rejecting an argument that "the district court erred in attaching little significance to" the forum choice of plaintiffs "who [chose] to engage in international transactions").

As this Court recognized nearly a century ago, "parties do not enter into civil relations in foreign jurisdictions in reliance upon our courts. They could not complain if our courts refused to meddle with their affairs, and remitted them to the place that established and would enforce their rights." *Cuba R.R. v. Crosby*, 222 U.S. 473, 480 (1912). Thus, "[w]hen an American corporation doing extensive foreign business brings an action for injury occurring in a foreign country, many courts have partially discounted the plaintiff's United States citizenship." *Reid-Walen*, 933 F.2d at 1395. This reflects that "[j]udicial concern for allowing citizens of the United States access to American courts has been tempered by the expansion and realities of international commerce." *Id.*; *see Contact Lumber*, 918 F.2d at 1450 ("In an era of increasing international commerce, parties who choose to engage in international transactions should know that when their foreign operations lead to litigation they cannot expect always to bring their foreign opponents into a United States forum . . . " (citation omitted)).

Contrary to the sound principles reflected in these decisions, the court of appeals in this case utilized a highly deferential standard favoring Lear's choice of a United States forum. The court failed even to acknowledge that Lear is a large multinational corporation with extensive operations worldwide, DX 12, actively sought the disputed overseas contracts, DX 12-14, 22, undertook significant activities in Saudi Arabia, DX 22, developed relationships with Saudi lawyers, accountants, and other professionals, DX 29, and indeed has substantial experience litigating – and winning – in Saudi courts. DX 32. Based on these factors, the court

of appeals should have reduced any deference to Lear's forum choice.

The court of appeals also ignored strong evidence of forum shopping by Lear, which courts likewise have held to reduce any deference to a plaintiff's forum choice in a *forum non conveniens* analysis:

> [T]he more it appears that the plaintiff's choice of a U.S. forum was motivated by forum-shopping reasons . . . the less deference the plaintiff's choice commands and, consequently, the easier it becomes for the defendant to succeed on a *forum non conveniens* motion by showing that convenience would be better served by litigating in another country's courts.

Iragorri, 274 F.3d at 72. In its contracts with employees, Lear consistently included forum selection clauses stating that "the courts of Saudi Arabia shall have sole jurisdiction over any disputes arising out of this Agreement." Doc. 117, Defs.' Reply MTD App. Ex. 2. When one of Lear's employees – a Texas resident – filed suit in United States district court, Lear succeeded in having the case dismissed on the ground that it must be litigated, if at all, in Saudi Arabia. *Spradlin v. Lear Siegler Mgmt. Servs Co.*, 926 F.2d 865 (9th Cir. 1991). Because Lear chose to litigate in Saudi court when that forum offered Lear a tactical advantage, Lear's choice of forum here is not entitled to a strong favorable presumption.

* * *

After discarding the erroneous presumption favoring Lear's choice of a United States forum, the balance of *Gilbert* factors requires *forum non conveniens* dismissal of this action to the Saudi court specified in the parties' contracts. Most significantly, Saudi law governs the parties' dispute, a factor this Court and courts of appeals uniformly have regarded as dominant in a *forum non conveniens* analysis. *See Piper Aircraft*, 454 U.S. at 260 & n.29 ("[I]n [*Gilbert*] we explicitly held that the need to apply foreign law pointed towards dismissal. . . . Many *forum non conveniens* decisions have held that the need to apply foreign law favors dismissal." (citing circuit decisions)). In addition, controlling weight must be given to the Arabic language versions of the SPAGE and TSP contracts, a requirement that simply cannot be given effect in United States courts, which "can only assimilate and interpret an English translation." *Tisdale v. Shell Oil Co.*, 723 F. Supp. 653, 659 (M.D Ala. 1988) (enforcing a forum selection clause to Saudi Arabia and noting, "[s]ince this court cannot read Arabic, it cannot give controlling weight to the Arabic version of the contract").

Also weighing in the balance is the Kingdom's strong public interest in using its own courts to resolve a dispute over its classified military defense contracts. Foreign sovereigns rightly do not expect to litigate such disputes in United States courts (and surely the United States would refuse to litigate its classified defense contracts in a Saudi or other foreign court). Indeed, litigation of only the jurisdictional questions in this case already has caused unauthorized disclosure of portions of the Kingdom's classified military information, highlighting the impropriety of litigating this case in United States courts.

CONCLUSION

If the Court grants Lear's petition to review the court of appeals' holding that the Kingdom is immune from Lear's TSP claims, the Court should also grant this conditional cross-petition to *first* review the denial of dismissal on *forum non conveniens* grounds under a highly deferential standard that improperly favored Lear's choice of a United States forum. *See Sinochem Int'l*, 549 U.S. at 436.

Respectfully submitted,

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